No. 10030

In the United States Circuit Court of Appeals

For the Ninth Circuit

In the Matter of West Hills Memorial Park, a corporation, Bankrupt, Wm. H. B. Smith, Jr., H. J. Sandberg, Howard-Cooper Corporation, Shell Oil Company, James A. Sewell, Drake Lumber Company, C. H. Martin, George Teufel, Howard E. Golden, P. E. Golden, L. L. Dougan, Warren H. Cooley, Oregon Securities Company, Cutler Printing Company and Oregon Sign & Neon Corporation,

Appellants,

vs.

Clarence X. Bollenback, Trustee of the Estate of West Hills Memorial Park, a corporation, Bankrupt,

Appellee.

Brief of Appellee

Upon Appeal from the District Court of the United States for the District of Oregon.

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Brief of Appellee

Upon Appeal from the District Court of the United States for the District of Oregon.

STATEMENT OF JURISDICTION

This is an appeal from an order of the United States District Court for the District of Oregon affirming a ruling of the Referee in Bankruptcy where in the Referee held that there was a failure to elect a trustee, and thereupon appointed the appellee, Clarence X. Bollen-

back, as trustee of the bankrupt estate. The appellants, being aggrieved with the ruling of the Referee, and the District Court, brought this appeal under Title 11, Section 47a, U.S.C.A., as amended.

STATEMENT OF THE CASE

An involuntary petition in bankruptcy was filed on July 3, 1940, in the United States District Court for the District of Oregon against the West Hills Memorial Park, a corporation engaged in the operation of a cemetery near the vicinity of Portland, but located in Washington County, Oregon. The issue of insolvency was tried before a jury resulting in the holding that the said West Hills Memorial Park was insolvent, and thereupon an order of adjudication was duly made and entered on the 23rd day of May, 1941.

At the first meeting of creditors of the bankrupt held before Honorable Estes Snedecor, Referee, two groups of creditors were present and duly presented claims against the bankrupt, and participated in the voting for the election of a trustee. Group A presented and voted fifteen claims totalling $5202.54 in favor of Herbert M. Cole, as trustee. Group B presented and voted eight claims which, together with those under $50.00, amounted

to $5288.96 in favor of Clarence X. Bollenback, as trustee.

Among the eight claims that were voted by Group B in favor of Clarence X. Bollenback, was a claim in the sum of $2500.00 by R. N. Kavanaugh, as Administrator of the Estate of his father, Judge J. P. Kavanaugh, deceased. To this claim Group A interposed objections. The Administrator as the claimant was present at the time the objections were made and the Referee, upon a summary hearing held at the time, as to the character of the claim, overruled the objections and allowed the claim to be voted.

Among the claims voted by Group B five claims had been executed after the jury found on the issue of insolvency, but prior to the entry of the formal order of adjudication. The objections to these claims on that ground were likewise overruled by the Referee.

When the vote was taken the Referee ruled that Group A had a majority in number of claims and that Group B had a majority in amount, and hence determined that the creditors did not elect and thereupon appointed Clarence X. Bollenback as trustee of the said bankrupt estate. The said trustee thereupon qualified and assumed the duties of trustee of said estate.

SPECIFICATIONS OF ERROR

The petitioners contend that the Referee and likewise the District Court of the United States for the District of Oregon erred in overruling the objections of the appellant's to the right of the Kavanaugh claim to be voted for the election of a trustee, and secondly that the Referee and likewise the District Court of the United States for the District of Oregon erred in permitting a number of claimants in Group B to vote claims that were executed prior to adjudication but subsequent to the jury's verdict on the issue of insolvency, and thirdly that the Referee and likewise the District Court of the United States for the District of Oregon erred in holding that there was no election, and thereupon making necessary the appointment of a trustee.

ISSUES INVOLVED

The germaine issues involved in this appeal are: (1) whether the Kavanaugh claim should have been permitted to vote at the first meeting of creditors for the election of a trustee, and (2) whether the claims properly executed after the issue of insolvency was determined by the jury, but prior to the entry of the formal order of adjudication, should have been permitted to participate in the voting for the trustee at the first meeting of creditors.

POINTS AND AUTHORITIES

A

Claims for legal services rendered to the bankrupt prior to bankruptcy, if otherwise valid, are provable and allowable in bankruptcy.

Adams vs. Napa Cantina Wineries,
94 F. (2d) 694; 36 A. B. R. (N. S.) 8;
2 Remington on Bankruptcy, (4th Ed.) 229.

Re Goldstein, 199 F. 665.

B

The filing of a proof of claim duly verified asserting a claim valid on its face is prima facie evidence of its provability and allowability.

Whitney vs. Dresser,
200 U. S. 535; 50 L. ed. 584;
15 A. B. R. 326.

Moore vs. Crandall,
205 F. 689; 30 A. B. R. 517.

Dickinson vs. Riley,
86 F. (2d) 385.

Durrance vs. Collier,
81 F. (2d) 4.

In re Hannevig,
10 F. (2d) 941.

C

Where the claimant is present at the meeting to elect a trustee and prepared to support the claim, it is not error for the referee to allow it for voting purposes.

In re Louis Elting Inc.,
4 F. Sup. 732.

Baumbauer vs. Austin,
186 F. 260.

The Kavanaugh claim constituted an account stated under Oregon law and was therefore not subject to the objection that the claim should set forth the particular items of service.

Steinmetz vs. Grennon,
106 Ore. 625.

D

A finding of fact by a referee is conclusive unless there was no evidence to support it.

Kowalsky vs. American Employers Ins. Co.,
90 F. (2d) 476.

In re Newman,
CCH, Sec. 53,675, decided March 12, 1942.

E

The line of cleavage with reference to the condition of the bankrupt estate is as of the time the petition was filed and the date of the adjudication relates to the time of the filing of the petition.

Vol. 4, Remington on Bankruptcy,
(4th Ed., Sec. 1377.)

Everett vs. Judson,
228 U. S. 474;
57 L. ed. 927.

ARGUMENT

A

The appellant contends that a claim for services as an attorney for a bankrupt should be excluded from voting in the election of a trustee, and in support of that contention cites the case of *Beale vs. Smead,* 81 F. (2d) 970.

We respectfully submit that the contention is untenable, and the case cited fails to support the proposition suggested. We concede that in certain circumstances a claim of an attorney for services rendered the bankrupt prior to bankruptcy and who continues to represent the bankrupt in the bankruptcy proceeding, would be prop-

erly disallowed for voting purposes, in order that possible collusion in the selection of a trustee would be avoided, but no case has been cited, and we respectfully submit that none can be found to uphold the general proposition that an attorney who represented the bankrupt and performed legal services on his behalf many years prior to bankruptcy, and who is no longer representing the bankrupt, that such a claim should be disallowed.

In the Beale case the claim that was disallowed for voting purposes was the claim of an attorney who represented the bankrupt in the bankruptcy proceeding. We further submit that the general law is that a claim for legal services rendered to the bankrupt prior to bankruptcy if otherwise valid is provable and allowable in bankruptcy, and has the same standing as the claim of any other creditor.

In the case of *Adams vs. Napa Cantina Wineries Inc.*, 94 F. (2d) 694, the question was raised as to whether or not attorney's fees for services rendered in filing action on the note prior to debtor's petition under Section 77b of the Bankruptcy Act, 11 U.S.C.A. 207, was provable. In holding that such a claim is provable, the court said:

> "Likewise attorney's fees for services rendered in filing action on the note prior to the filing of debtor's petition are provable."

In the instant case the claim was presented by the administrator of Judge J. P. Kavanaugh, deceased, who performed services for the bankrupt between May 1, 1935, and October 1, 1938, long before the bankruptcy of the corporation, and when the relationship of attorney and client had long since ceased to exist.

In fact the claim of Will Masters, the attorney for the bankrupt in this proceeding was objected to and the objection sustained by the Referee, and said claim was not allowed to vote.

B

The appellant further contends that a proof of claim must set forth the particulars and items upon which the consideration is based, else it should not be permitted to participate in the election of a trustee.

While we have no quarrel with that general proposition of law, we submit, however, that it has no application to the instant case. The objection that was directed towards the Kavanaugh claim was not that it was not a valid claim, but rather that it was not particularized.

It is to be noted that at the time the objection was urged to said claim, the referee heard the matter in a summary manner. Mr. Kavanaugh, the administrator,

informed the court and those present, that the services were rendered between 1935 and 1938 by his father, and that statements for the amount upon which the claim was based had been rendered to the bankrupt from time to time, and never questioned. Mr. Lenske, representing the objecting creditors, stated that he knew that Judge Kavanaugh had rendered valuable services to the bankrupt for over a period of years. And further the record on the trial of the insolvency petition showed that the petitioners (appellants herein) introduced testimony as to the validity and amount of the Kavanaugh claim in order to show insolvency. While this fact is not conclusive, the referee could consider such fact upon summary hearing to determine whether the amount of the claim was proper for allowance. Thus, the finding by the referee that the claim was valid as presented, is a finding that carries finality and should be conclusive unless there was no evidence to support it. *Re Kowlasky vs. American Employers Company,* 90 F. (2d) 476; *In Re Newman,* (decided March 12, 1942, CCA (6th) C.C.H., Sec. 53,675).

Moreover claimant, R. N. Kavanaugh, as administrator, was present, was subject to examination and cross-examination, and under these circumstances it has been held, *In Re Louis Elting, Inc.,* 4 Fed. Sup. 732,

that it would remove the objection that the claim was not itemized.

In Re Louis Elting, Inc., 4 F. Sup. 732, objection was made to a claim because it did not set forth the character of the merchandise sold and delivered by the creditors, but the creditor was present and tendered himself for examination in the event it was desired. In affirming the holding the referee that the objection was not sufficient, the District Court for the Southern District of New York, held:

> "In proceedings for election of a trustee in bankruptcy, proof of claim, although not setting forth character of merchandise sold and delivered, was sufficient where the creditor was present and supplied necessary information and tendered himself for further cross-examination if desired."

It is suggested by the appellants that the ruling in the Elting case should not be extended for the reason that "there is a difference between an obligee being present and offering to give the facts concerning his services, and an administrator or an assignee being present." We fail to understand that distinction or to see any difference. Moreover the general practice is that upon an objection to a claim, the referee has discretion as to whether or not the same should be permitted

to be voted, although it may subsequently be subject for reconsideration as to whether the claim would be allowed in whole or in part. Unless there is an abuse of that discretion, the referee's determination should not be disturbed.

We submit further that the objection on the ground that the claim was not itemized and did not express the consideration is untenable, for the reason that the Kavanaugh claim was based on an account stated under the laws of the State of Oregon, and therefore did not require a bill of particulars in order to comply with the bankruptcy provisions in regard to the itemization of a claim. As heretofore pointed out, the claim was based on services rendered between 1935 and 1938, for which services statements setting forth the amount was sent to the bankrupt with no objections ever being made thereto by the bankrupt. Under these circumstances the proof was not on a running open account, but rather upon an account stated.

Steinmetz vs. Grennon, 106 Or. 625, was an action upon an alleged account stated arising out of a copartnership venture. The defendant denied that any balance was struck, and particularly denied that the account was stated as alleged in the complaint. In discussing whether or not the account was stated or otherwise, the Supreme Court of the State of Oregon, said:

"An account stated is an agreement between persons who have had previous transactions of a money character fixing the amount due in respect to such transactions and promising payment: Truman vs. Owens, 17 Or. 523 (21 Pac. 665); Holmes vs. Page, 19 Or. 232 (23 Pac. 961); Crawford vs. Hutchinson, 38 Or. 578 (65 Pac. 83).

"Since an account stated is an agreement, it, like any other agreement, cannot be said to exist unless the minds of the parties have met. The parties must agree that the balance struck is correct. *The agreement may result from acquiescence implied from the failure to object to an account rendered by one party to the other;* or an account stated may result where the parties meet and go over other accounts and strike a balance in favor of one of them and the other assents to the balance as correct. The form of the assent is generally immaterial, for it may be express or it may be implied from the conduct of the parties and the circumstances of the case. If, in the instant case, there was an account stated, it was one where the parties met and after going over their accounts agreed upon the balance due from one to the other.

"An account stated involves as a necessary element a promise to pay the balance ascertained to be due. This promise may be express; but if it is not actually expressed the law will imply a promise to pay when the parties agree upon the amount due or when their conduct justifies the inference that they have agreed."

We submit that under the above Oregon decisions, in light of the record in this case, that the Kavanaugh claim is based on an account stated, which removes the

objection that it failed to set forth the items upon which services were rendered.

We further submit that it was encumbent upon the appellants, when the objection was made to the Kavanaugh claim, to go forward and present evidence in support of such objection, and having failed to do so, the Referee was warranted in permitting the claim to be voted. The duly verified claim is prima facie evidence of its validity.

In the case of *Whitney vs. Dresser,* 200 U. S. 535, 50 L. ed. 584, the Supreme Court said:

> "*The only question warranting the appeal is whether the sworn proof of claim is prima facie evidence of its allegations in case it is objected to.* It is not a question of the burden of proof in a technical sense—a burden which does not change whatever the state of the evidence—but simply whether the sworn proof is evidence at all.
>
> "The Circuit Court of Appeals observed that the proof of claim warrants the payment of a dividend in the absence of objection, and therefore, must have some probative force. In reply it is argued that what is done in default of opposition is no test of what is evidence when opposition is made; that a judgment may be entered on a declaration for wan of an answer, yet a declaration is not evidence; that it is contrary to analogy to give effect to an ex parte affidavit, and that on general principles it is the right of any party against whom a claim is made to have it proved, not only upon oath, but subject to cross-examination.
>
> "Notwithstanding these forcible considerations we

agree with the Circuit Court of Appeals. The prevailing opinion, not only in the Second Circuit, but elsewhere, seems to have been that way * * * The alternative would be that the mere interposition of an objection by any party in interest, section 57d, would require the claimant to produce evidence. For if the formal proof is no evidence a denial of the claim must have that effect. If it does not, then the formal proof is some evidence even when there is testimony on the other side. The words of the statute suggest, if they do not distinctly import, that the objector is to go forward, and thus that the formal proof is evidence even when put in issue."

In *Dickinson vs. Riley,* 85 F. (2d) 385, the Circuit Court of Appeals said:

"Since 'the proof of claim is prima facie evidence of the validity of the claim' * * * a verified claim when filed, puts the burden on the trustee to overcome by some substantial evidence, the prima facie case thus made."

In *Durrance vs. Collier,* 81 F. (2d) 4, the Circuit Court of Appeals again stated:

"Bankruptcy proceedings are more summary than ordinary suits, and a sworn proof of claim against a bankrupt is prima facie evidence of the allegations in case it is objected to."

In re Hannevig, 10 F. (2d) 941, the Circuit Court of Appeals stated:

> "The proof of claim submitted by the liquidator of the bank and sworn to by him, states that the bankrupt 'still is justly and truly indebted to the said bank in the sum of $320,364.80.' This in itself is prima facie proof, and no further proof needs to be produced unless evidence contradicting it is produced by the objector * * * We must therefore examine the record to ascertain what proof it contains which contradicts and overcomes the prima facie case made out by the proof of claim."

In the case of *Moore vs. Crandall,* 205 F. Rep. 689; CCA (9), the Court said:

> "It is well settled that in bankruptcy proceedings, a sworn proof of claim is prima facie evidence of its allegations as against the objections of the trustee; that is to say, Mrs. Crandall's formal proof is some evidence of the alleged fact that she acted as a clerk in her husband's store, that she was to be paid wages at $20.00 per week, that it was specifically agreed upon between her and her husband that she was to receive her wages for her own and separate use, and that such agreement was made with her at the opening of the bankrupt's business. Her case was therefore made prima facie and she could await the introduction of evidence, if any, could be produced tending to overcome that she had presented."

We contend that the effect of the sworn proof of claim filed by the administrator of the estate of Judge

J. P. Kavanaugh, deceased, is to require an objector to go forth and to impeach its validity. The record in this case is devoid of any evidence which tends to impune the validity of the Kavanaugh claim. Indeed counsel for the objectors concede that the services upon which the claim was based were rendered by Judge Kavanaugh over a period of years. No attempt was made to impeach the reasonableness of the amount. Under these circumstances the Referee was justified to permit the Kavanaugh claim to vote in the amount it was sworn to be due and owing.

It is further contended that the referee erred and likewise the District Court of the United States for the District of Oregon, in permitting several of the claims in Group B to vote for a trustee over the objection of the appellants because the said claims were executed subsequent to the jury's verdict of insolvency, but prior to the entry of the formal order of adjudication. No authority is cited in support of that proposition and we contend that the position is entirely fallacious. The condition of a bankrupt estate whether it relates to property or to the status of creditors is generally held to be as of the time the petition was filed and the date of the adjudication relates to the time of the filing of the petition.

The principle may be gathered from the decisions

involving title to property where it is held that the property which vests in the trustee at the time of adjudication is that which the bankrupt owned at the time of the filing of the petition.

In *Everett vs. Judson,* 228 U. S. 474, the Supreme Court said:

> "We think that the purpose of the law was to fix the line of cleavage with reference to the condition of the bankrupt estate as of the time at which the petition was filed, and that the property which vests in the trustee at the time of adjudication is that which the bankrupt owned at the time of the filing of the petition. * * * We think it clear that the time of the filing of the petition in this case should be taken as the date of cleavage determining the property passing to the trustee, and through him to the creditors."

Even if these claims have some informal defect, we submit that such would not justify the referee in disallowing them for the purposes of voting. To take such a position would be to accept form instead of substance, and the generally accepted principle is that the practice regarding proof of claims is to be liberal and free from technicalities. *In re Goldstein,* 199 F. 665, the petitioner for review contended that the referee should have disallowed the proof altogether, but that instead of doing so, he amended it on his own motion and reduced it to the amount of $1700.00, and that the referee erred in allowing

it for $1700.00 without requiring the proof to be resworn. The District Court in upholding the referee said:

> "If this contention is sound a proof of claim must be regarded as an entirety which the court must either accept in full or reject altogether. I find nothing in the act which requires me to so regard it. * * * There are express provisions in Section 57 (k and l) for the re-allowance or rejection in whole or in part of a claim reconsidered after allowance, but it is not only upon reconsideration that objections to a claim either by parties in interest or by the court of its own motion may be dealt with. Clauses (d and f) of Section 57 provide for the hearing and the determination of such objections before allowance, and I am unable to believe it a necessary result of clauses (k and l) that the original allowance of a claim can only be for the full amount and may not be for a part of that amount. To say that this is what the act requires and that a claim of which a part, but not the whole, is sustained by the proof must be amended and resworn before it can be allowed at all, would be in my opinion a departure unwarranted by anything in the act from the recognized principle that the practice regarding proof of claims is to be liberal and free from technicalities."

Similarly in the instant case, as far as the objection to the claims voted by Group B which were executed subsequent to the jury's verdict, a liberal construction should be applied, rather than the restrictive and the technical.

It is to be noted that no question has been raised

as to the capacity and qualification of the appointee to act as trustee of this estate.

CONCLUSION

In conclusion, we respectfully submit that no error can be found in the ruling of the referee and the decision of the district court in affirming said ruling by holding that the Kavanaugh claim and the other claims were properly voted under the circumstances disclosed by the record, and that the determination by the referee that no election resulted and therefore required the appointment of a trustee was proper and the order of the court appealed from should be affirmed.

Respectfully submitted,

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